In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 357

BULLAH L. BAXTER, individually and as Executrix of the Last Will and Testament of Howard W. Baxter Deceased,

Petitioner,

vs.

WILMER C. ROGERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California, Second Appellate District.

BULLAH L. BAXTER, pro se,

[illegible]

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Of Counsel.

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PETITION FOR WRIT OF CERTIORARI
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This is a petition for a Writ of Certiorari by Beulah L. Baxter individually and as executrix of the last will and testament of Howard W. Baxter, deceased to the District Court of Appeal of the State of California, Second Appellate District.

Following Rule 23 of the Revised Rules of the Supreme Court of the United States petitioner states:

Subdivision 1(a) of said Rule 23.

The Supreme Court of California rendered no opinion except only to deny Beulah Baxter's petition for a hearing. A copy of that denial is appended hereto and a certified copy of it has been sent to the Clerk of the Supreme Court of the United States.

Under California law, the Supreme Court's denial of a petition for a hearing is an affirmation of the opinion of the District Court of Appeal in Los Angeles. A copy of the District Court of Appeal's opinion is found in the official California reports as 191 A.C.A. 350; also in Vol. 12, West's California Reports 635 and a copy of it is hereto appended. It is not found in the Pacific volume of the National Reporter System.

A copy of the District Court of Appeal's decision is appended to appellant's petition for a hearing in the Supreme Court of California and the Clerk of the District Court of Appeal has certified that copy.

A copy of the judgment of the trial Court rendered pursuant to a jury verdict is likewise appended. It is reported nowhere and exists only in the office of the County Clerk of San Luis Obispo County, California. The trial Court's judgment is included among the last pages of the Clerk's Transcript and is included also as an appendix at the end of appellant's opening brief, filed with the District Court of Appeal. The trial judge issued no opinion or report of any kind.

Subdivision 1(b) of said Rule 23.

As to a concise statement of the grounds on which the jurisdiction of the Supreme Court of the United States is invoked, petitioner states:

1(b) (i) The date of the judgment or decree sought to be reviewed and the time of its entry is June 14, 1961, that being the date of denial by the Supreme Court of California of a petition for hearing; but the date of the judgment or decree of the last court which took jurisdiction of and rendered an opinion or judgment, to wit, the District Court of Appeal of the State of California, Second Appellate District, was April 18, 1961.

1(b) (ii) Petitioner made no attempt to have a rehearing by the Supreme Court of California, and no such order was made. The decision of the District Court of Appeal was made, filed and entered on the 18th day of April, 1961 and that Court denied a petition for rehearing May 18, 1961, and said denial was filed and entered said 18th day of May, 1961.

1(b) (iii) The statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review the judgment by writ of certiorari is section 1257, subdivision 3 of 28 United States Code Annotated.

Subdivision 1(c) of said Rule 23.

This petition presents a single question for review, all other points raised and debated in the Courts of California being considered by petitioner as involving state law only.

This litigation grows out of an automobile accident as to which these two parties, Beulah Baxter and Wilmer Rogers are the sole eye witnesses, no other person having been present at the time of the accident except Howard Baxter, husband of Beulah Baxter and driver of the Baxter car, who lost his life as a result of injuries thus received.

Petitioner now complains of the trial Court's having given to the jury duly empanelled to try the case a certain instruction at the request of counsel for McCormick & Baxter Creosoting Company, a corporation, which was sued for damages by Wilmer Rogers in a separate action consolidated for trial and actually tried together with the case now before the Court. At the time of that trial neither Beulah Baxter nor the estate of her deceased husband was party to the case in which said corporation was sued.

The faulty instruction read to the jury is as follows:

> "In judging the credibility of witnesses, including any party who has testified, you shall have in mind the law that a witness is presumed to speak the truth. A witness, however, may be impeached and this presumption overcome by contradictory evidence; by the manner of the witness on the stand; the degree of intelligence exhibited by him; the character of his testimony; by evidence showing his motive or interest in the outcome of the case or his bias or prejudice for or against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony; by evidence adversely affecting the char-

> acter of the witness for truth, honesty or integrity; by proof that he has been convicted of a felony.
>
> You will note that I do not say that any of the matters I have mentioned do overcome the presumption that the witness is speaking the truth. I only say that they may overcome that presumption. It is for you to decide whether they do or do not."

This instruction is quoted at length in opinion of District Court of Appeal footnote. It is also found as page 70 of Clerk's Transcript from the Clerk of the trial Court in San Luis Obispo County, California.

The question is whether thus instructing the trial jury constituted prejudicial error, violative of the due process clause of the United States Constitution.

It is of course not contended that every word of that instruction violates the due process clause.

The offensive portion is understandable by deleting it from the acceptable. By doing so, it reads:

> "In judging the credibility of witnesses, including any party who has testified, you shall have in mind the law that a witness is presumed to speak the truth. A witness, however, may be impeached * * * by the manner of the witness on the stand; the degree of intelligence exhibited by him; the character of his testimony; by evidence showing his motive or interest in the outcome of the case or his bias or prejudice for or against one of the parties * * *"

This petitioner contends that the due process clause of the United States Constitution is violated when a

jury is told by the trial judge that a witness "including any party who has testified" may be impeached, which under California law means discredited, by reason of:

> "* * * the manner of the witness on the stand;"
>
> "the degree of intelligence exhibited by him;"
>
> "the character of his testimony;"
>
> "by evidence showing his motive or interest in the outcome of the case or his bias or prejudice for or against one of the parties".

The vice of these uncertain standards is emphasized not only by declaring that a witness who is a party, to wit, Mrs. Baxter coming from distant Piedmont well over two hundred miles from the relatively rural community of San Luis Obispo, may be thus discredited but by the succeeding paragraph of the same instruction:

> "You will note that I do not say that any of the matters I have mentioned do overcome the presumption that the witness is speaking the truth; I only say that they may overcome that presumption. It is for you to decide whether they do or not."

From reading the last quotation it is noted that the trial Court tells the jury it is for them to determine whether those factors have removed the presumption of the witness' having told the truth; no such saving grace is extended to the more destructive element of impeachment.

Subdivision 1(d) of said Rule 23.

This case involves no treaty, ordinance or regulation but does rest upon Section 1 of Amendment 14 of the United States Constitution which provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That provision is found on page 29 of Federal Code Annotated in Volume designated as Constitution—Articles 1 to 7 and published by Bobbs Merrill.

On page 28 of the same lawbook is found also Amendment 7 as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law".

The chief basis of this petition is the due process clause.

Subdivision 1(e) of said Rule 23.

A concise statement of the case containing the facts material to the consideration of the questions pre-

sented is nearly all included in the decision of the California District Court of Appeal as follows:

> "In the trial court, the appellant Beulah L. Baxter unsuccessfully sought damages from respondent Wilmer C. Rogers for her personal injuries and, as executrix of the last will and testament of her deceased husband, for the latter's death. Both claims arose out of a collision between a vehicle driven by the appellant's husband, Howard W. Baxter, in which the appellant was riding, and a vehicle driven by the respondent Rogers. The collision occurred on August 12, 1957, at approximately 10:30 p.m.
>
> The respondent was driving south on a highway known as Alternate U. S. 101 outside the city limits of San Luis Obispo. The appellant and her husband were returning to their home in Piedmont from a trip to Los Angeles. They had been traveling northeast on Portuguese Flat Road. This road joins Alternate U. S. 101 at an angle. Traffic on Portuguese Flat Road is required to stop before entering Alternate U. S. 101, which is a through highway at this point. The intersection is marked for vehicles traveling northeast on Portuguese Flat Road by a stop sign at the side of the road and the word 'STOP' and a stop or limit line painted on the road. Due to the angle of the intersection, the stop or limit line is approximately 55 feet beyond the stop sign at the side of the road. Vehicles traveling north on Portuguese Flat Road must stop, cross the southbound lane of Alternate U. S. 101 at an angle, and continue north on the northbound lane of Alternate U. S. 101. The collision occurred as the vehicle in which the appellant was riding was

> crossing the southbound lane to get into the northbound lane. It was nighttime; the intersection was not lighted. The appellant testified that her husband made a boulevard stop but, in effect, that the respondent was traveling without lights. The respondent contended that the appellant's automobile failed to make the required stop at the intersection before coming onto Alternate 101 and was driven directly into the path of the respondent's vehicle. The jury returned verdicts for the respondent and against the appellant in her individual and representative capacities, respectively."

Another factual detail, also expressed in the opinion of the District Court of Appeal, which though not directly related to the instruction here criticized is perhaps helpful in understanding the whole situation. Quoting again, it is as follows:

> "The appellant, Mrs. Baxter, testified that her husband stopped his automobile at the point where the stop sign was located. But she did not see the word 'STOP' which was painted on the pavement beyond that point. No further stop was made before the collision occurred as far as she knew. A police officer testified that the distance between the stop sign and the limit line painted on the roadway was 50 to 60 feet. Another officer testified that he had made notations to the effect that the word 'Stop' and the limit line on the roadway were 'faint' at the time of the accident; those markings had not been recently painted."

Continuing later on, the District Court of Appeal held:

> "If, in the present case, the word 'Stop' and the limit line painted on the roadway were partly obliterated, so that they could not be readily seen, whether such condition arose from wear or because the markings were covered by dirt or otherwise affected, such fact could constitute an excuse for failure to stop at the limit line where the existence of such limit line was otherwise unknown to the motorist."

Petitioner will not pursue the limit line discussion further because it leads into points not of a federal nature.

Added to the facts thus epitomized in the opinion of the California Appellate Court are that a series of street lights lighted Alternate 101 from the City of San Luis Obispo where Wilmer Rogers started his journey after visiting a beer tavern to within a few hundred feet of the scene of the accident; that the impact pushed the Baxter car back some seventeen feet; that as a matter of judicial notice at that time of that night the moon was full; that Mrs. Baxter emphasized repeatedly in her testimony both on direct and cross-examination that before entering Alternate 101 both she and her husband looked in both directions and that no lights of the Rogers car were in existence. Referring to the Reporter's Transcript:

> Q. (By Mr. Nelson, asked of Mrs Baxter.) Going back to an earlier topic just for a minute, Mrs. Baxter, when you and Howard—when you stopped at the stop sign and you looked up to your left did you see any lights of any automobile?

A. No, no automobiles. There was nobody behind us, in front of us or any place.

Q. I mean when you looked up to your left up this old Highway 101 toward this City of San Luis Obispo, did you see the lights of any automobile?

A. No.

Q. (Asked of Mrs. Baxter.) No cars were in sight?

A. No, we wouldn't drive in front of any lights. (Reporter's Transcript, p. 200, lines 16-26.)

Q. Which way did you look?

A. Both ways, up and down the alternate——

Q. And it is your testimony now that the time you stopped there, you did not see the lights of any car coming down the highway?

A. No.

Q. You are sure of that?

A. No, there were no cars. (R.T. 205, lines 3-24.)

Q. And do you recall starting up from the stop sign?

A. We just started up and that is the last I remember.

Q. And you don't remember at the time you started up seeing any cars or lights any place?

A. No. There was nothing.

In opposition to the foregoing defendant Rogers testified firmly that his lights were plainly on the whole time and clearly visible and in good service. (R.T. 127, lines 1-2; R.T. 128, lines 22-23; R.T. 166, line 19; R.T. 171, lines 1-6.)

Added to the foregoing was testimony of defense witness Don Samuels that as an experiment on a dark night he tried to drive at the place in question without lights, but could not do so (R.T. 178-191) and the general effect of three police officers, two being highway patrolmen in support of and called by Rogers.

Subdivision 1(f) of said Rule 23.

As to raising the due process clause in the state Courts we have the following points:

In referring to the above quoted instruction the District Court of Appeal in its opinion recited accurately:

> "The first instruction, the giving of which the appellant asserts constituted prejudicial error, was one concerning the credibility of witnesses and was requested by counsel for McCormick and Baxter Creosoting Company."

In the transcript furnished by the Clerk of the Superior Court of San Luis Obispo County for use on the appeal, the aforesaid instruction is set forth verbatim at page 70 and is designated as being "Defendant's Instruction No. 17". The "defendant" is the McCormick and Baxter Creosoting Company, a corporation, which was sued by Wilmer Rogers in a separate action consolidated for trial with the present case and disposed of during the trial by a settlement.

Section 647 of the Code of Civil Procedure of California provides in clear language that among matters considered excepted to even though a party raised no objection at any time during the trial is the

> "* * * giving an instruction, although no objection to such instruction was made * * *"

Following that statute the Supreme Court of California in the recent (1957) case of *Barrera v. De La Torre,* 48 Cal. 2d 166 (at page 170), 308 Pac. 2d 724 held:

> "But, of course, they may question the correctness of the charge to the jury though they made no complaint at the time of its occurrence. Code of Civil Procedure 647; Cook v. L. A. Ry. Corp'n, 13 Cal. 2d 591, 594, 91 Pac. 2d 118."

The trial Court ignored the federal question.

As to raising the due process clause in the California District Court of Appeal we may quote from page 5 of the petition for rehearing in that Court:

> "Telling a jury that they may consider one impeached by reason of her motive or interest in the outcome of the case is exactly the same as authorizing impeachment by reason of having filed the lawsuit.
>
> It is a reversion to the doctrine of the dark ages, once prevalent but long ago discarded in England that parties to the action could not testify. What is the use of testifying if the party may be impeached for having filed the action or due to her 'degree of intelligence' or 'manner' 'on the stand'?
>
> It is believed that the impeachment instructions are actually a violation of the due process clause of the United States Constitution. Certainly when the jury is instructed that a litigant may be distrusted by reason of her having filed the law

> suit and because of her degree of intelligence and manner on the stand, she gets no fair trial.
>
> The misleading instruction is particularly harmful when as here she is the sole witness to the accident, testifying on her side, with a sharp conflict in the evidence."

The District Court of Appeal of California did not discuss the federal question thus called to its attention.

As to raising the due process of law clause in the Supreme Court of California, at pages 16 and 17 of appellant Beulah Baxter's petition for a hearing by that Supreme Court the following argument is set forth:

> "Appellant considers the impeachment instruction a violation of the United States Constitution because under it every litigant is guaranteed due process of law and most certainly no one who is to be impeached for the frivolities listed by the trial Court in this case gets a fair trial.
>
> The instruction is in reality a reversion to the Middle Ages when there was prevalent the doctrine long ago discarded in England that parties to a case could not testify. There seems little usefulness in a party's testifying when she is to be wholly discredited due to her 'manner on the stand', 'degree of intelligence' or the 'motive', 'interest in the outcome of the case', 'bias' and 'prejudice' all established by her having filed the lawsuit and bringing it to trial."

Also, under California practice, when a petition for hearing is filed with the Supreme Court after

hearing by the District Court of Appeal, all briefs and records lodged with the District Court of Appeal come before the Supreme Court.

The Supreme Court of California did not discuss the federal question thus called to its attention. The judgment and order of the Supreme Court simply was "Hearing Denied"—nothing more of substance.

The District Court of Appeal had given the same answer previously to a petition for a rehearing in that Court.

Under California practice in a case once properly before the District Court of Appeal, an intermediary Appellate Court, there is no way of bringing a point to the attention of the Supreme Court except to include it in a petition for hearing in the Supreme Court, which was done as aforesaid.

The Supreme Court will assume that the state court considered the federal question presented to it.

Gryger v. Burke, 334 U. S. 728, 92 L. Ed. 1683, 68 S. Ct. 1256.

Subdivision 1(h) of said Rule 23.

Presenting a direct and concise argument amplifying the reasons relied on for allowance of the writ becomes awkward in view of subdivision 3 of Rule 23 evidently disallowing the presentation of a brief in connection with the original application.

However, the following may be pertinent:

First: We should understand what under California law the term impeach really means. That state's defi-

nition of the term seems to be in line with that of other jurisdictions.

As held in *People v. Shannon,* 147 Cal. App. 2d 300 at page 305, 305 Pac. 2d 101:

> "The word 'impeach' is in common usage—meaning to discredit. Such ordinary words do not require defining. They are presumed to be understood by the jurors."

The jury may "disbelieve" a person who has been impeached. *People v. Grischott,* 107 Cal. App. 2d 631 at page 634, 237 Pac. 2d 712; the jury may "reject his testimony entirely", *People v. Ross,* 46 Cal. App. 2d 385 at p. 397, 116 Pac. 2d 81; *Halloran v. Greene,* 114 Cal. App. 685, 300 Pac. 469; consider that "the question of his credibility was subject to great suspicion" and regard the witness as "disparaged", *People v. Ashrawry,* 130 Cal. App. 145 at page 152, 19 Pac. 2d 536; or hold that such a witness "is less likely to be honest and truthful" than others, *People v. Hardwick,* 204 Cal. 582, 269 Pac. 427. The purpose of impeachment is to "show that he was not worthy of belief", *People v. Brown,* 81 Cal. App. 226 at page 237, 253 Pac. 735; to impeach is to "discredit", *People v. Singh,* 62 Cal. App. 450 at page 455, 217 Pac. 121; *Lopez v. Wisler,* 58 Cal. App. 2d 455 at page 462, 136 Pac. 2d 816; *People v. Vertrees,* 169 Cal. 404, 146 Pac. 890; impeachment may "destroy his evidence", *Vierra v. Gordon,* 113 Cal. App. 2d 700 at page 703, 248 Pac. 2d 981; and the testimony of an impeached witness may be "valueless", *Stuart v. Dotts,* 89 Cal. App. 2d 683 at p. 685, 201 Pac. 2d 820.

Added to this is the rule that

> "The jury had a right to assume that the court deemed it to be applicable to the issues being tried, or the court would not have so instructed them." *Balthrop v. A. T. & S. F.*, 167 Cal. App. 2d 437 at page 444, 334 Pac. 2d 1041.

And

> "It must be assumed that the jury understood the instructions and correctly applied them to the evidence." *Kading v. Willis,* 135 Cal. App. 2d 82 at page 93, 286 Pac. 2d 861.

According to the instruction given, Mrs. Baxter's testimony could be "disregarded", "disbelieved", "rejected", put under "great suspicion", "disparaged", "regarded as less likely to be honest and truthful", considered "not worthy of belief", "discredited", subjected to "bad inferences" or "destroyed" because the jury didn't like the manner in which she sat on the witness stand, or because she was either intelligent or not intelligent or possessed the wrong "degree" of intelligence or because she appeared to be interested in winning the lawsuit she had filed or because she evidently was biased against the defendant whom she asserted had caused by his careless automobile driving her own personal injuries and the loss of her husband.

This petitioner contends now and did contend before the state Courts in California that the criticized instruction made her a discredited and distrusted person simply because she filed this lawsuit; and that is what the instruction plainly does.

The first sentence of the instruction admonishes the jury that the term "witness" includes "any party who has testified".

Mrs. Baxter did testify and at considerable length as she was the only witness to the accident aside from the defendant.

Omitting words not relative to this point the instruction then says that:

"A witness, however, may be impeached" "by evidence showing his motive or interest in the outcome of the case or his bias or prejudice for or against one of the parties."

How more eloquently can one's "motive" be established than by showing that by filing the complaint in this action Mrs. Baxter's "motive" is to collect over a hundred thousand dollars from defendant?

How more clearly can her "interest in the outcome of the case" be demonstrated than by showing that in her complaint on file in this action (page 6 of Clerk's Transcript from trial Court) she demands for herself from defendant a huge sum of money?

How more conclusively can her "prejudice for or against one of the parties" be sustained than by her complaint which asserts that all her own serious personal injuries and the loss of her husband are due solely to the carelessness of defendant Rogers?

How more inevitably can her "bias" be shown than by her complaint which blames the whole tragedy on defendant Rogers?

It is but a fair and sound argument that by giving the here criticized instruction the trial Court authorized the jury to consider Mrs. Baxter from far away Alameda County "discredited", "not worthy of belief", put under "great suspicion" and her testimony "destroyed" simply because she filed the lawsuit against Wilmer Rogers, a local resident of San Luis Obispo.

Petitioner of course recognizes the universal rule that one's bias, prejudice, motive and interest in the outcome of the case may be taken into consideration in determining the weight of one's testimony and as important factors in determining where the probability of truth lies, but that does not mean they are grounds for impeaching a party and thus rendering her and the whole of her testimony paralyzed by all the afflictions above mentioned as normal attendants of an impeached person.

That Mrs. Baxter had most obviously a "bias", an "interest", a "motive", and a "prejudice" is beyond all dispute inherent in her being a party to the action and clear to every member of the jury and to everyone at all familiar with the case; so there is no point in saying those factors could not under the evidence apply to her. Every member of the jury would naturally assume and consider it to be a fact that any lady in the position of Mrs. Baxter had an interest and motive to succeed with the law suit she commenced and that she as a normal human being would hold some sort of a bias or prejudice against the person who caused her so much unhappiness; but that does

not mean that the trial judge should instruct the jury that for such reasons Mrs. Baxter is to be discredited and distrusted.

To hold Mrs. Baxter thus excluded from consideration as a witness in her own case, no minimum amount of bias or prejudice is prescribed. It seems that perhaps even some slight bias or prejudice would be sufficient.

Such a mandate, being wholly unreasonable and not in accord with any statute, cannot conform with due process of law.

Likewise, it is beyond dispute that Mrs. Baxter did have a "manner on the stand"; that was in plain sight before all the jurors throughout her testimony.

This peculiar provision turns a trial into a theatrical performance, making a mockery of the whole concept of due process of law, as an orderly search for truth, if a party's testimony may be maligned as unworthy of belief and herself distrusted and discredited on account of her "manner on the stand". No standard is set; there is no definition of a good or a bad manner, but any "manner" may be ground for rejecting whatever she says. It reminds one of primitive society or a fickle justice of the peace being swayed by the charms of an actress.

Again, it is not disputed that the manner of a witness on the stand may be one of the factors to be taken into consideration in appraising testimony of witnesses. The contention is that when this nebulous concept is laid down by the trial judge as a justifica-

tion for condemning a party's testimony altogether, due process of law has been disregarded.

Another eccentric criterion for casting out a party's testimony is that of the "character of his testimony".

No one can possibly know what that means; it may very well mean something entirely different to each of the twelve jurors. It can be determined largely by the type of questions asked or the subjects of inquiry pursued by examining counsel, all matters quite apart from any control by the witness and yet serve as a reason for rejecting all her testimony.

Perhaps the most objectionable of all the novel reasons for impeaching the party's testimony is that of the "degree" of her "intelligence". Nobody knows what that means; and yet it is a guide for the jury supposedly meditating a serious case in the light of due process of law. Is one of little intelligence to be for that reason discredited? Is one of high intelligence to be for that reason distrusted? Is one of moderate or some other plane of intelligence to be for that reason discredited? What is meant by the term "degree of intelligence"? Of what does a "degree" of "intelligence" consist? The jury is evidently assigned the task of ascertaining the degree of intelligence of each witness and then perhaps using the degree so discovered as a reason for rejecting the testimony. Of course, it would be proper to tell a jury that a person's opportunity to observe, ability to recall facts and apparent intelligence may all be taken into consideration in determining which of the witnesses is the more likely to have related the facts accurately;

but to tell the jury that a party or some other witness may be impeached and distrusted by reason of her "degree of intelligence" is an entirely different matter.

Actually that instruction authorizes the jury to condemn Mrs. Baxter's version of the accident simply because Mrs. Baxter's "intelligence" or "degree of intelligence" is what it is and regardless of whether it is high, low, average, perfect, imperfect, good, bad or possessed of or not possessed of any other imaginable quality or characteristic.

In other words, and to be strictly accurate, the trial Court's telling the jury that they are at liberty to reject Mrs. Baxter's testimony entirely, that is, consider her impeached, on account of the "degree of her intelligence", is exactly the same as authorizing and suggesting to the jury that they may thus disqualify Mrs. Baxter and consider her "not worthy of belief" and "disparaged" for absolutely no reason at all. That is the clear logic of the situation and if that accords with due process of law when she comes from a distant city to testify as her only actual witness to the accident and in opposition to a considerable array of circumstances produced by the defense, what sense is there for a person thus situated ever to file a lawsuit?

It must be remembered that as a proposition of due process of law we are not here dealing solely with instructions to a jury. The question is even more fundamental. If that instruction is good then every trial judge in our country trying issues without a jury like-

wise applies due process of law when he rejects wholly the testimony of witnesses for the illusory ideas enunciated in this instruction; in other words for no reason at all.

In California the same rule would apply in criminal cases.

The Supreme Court of Illinois in *C. W. D. Ry. v. Bert,* 69 Ill. 388 at page 390 tersely disposed of that unsound notion with its observation that:

> "As a general proposition, the trustworthiness of a witness is not to be graduated according to his intelligence."

In the later case of *N. Chicago v. Wellner,* 206 Ill. 277, 69 N.E. 6 the *Bert* case was approved and the opinion stated:

> "While the jury has the right to take into consideration a witness' intelligence or lack of intelligence in determining the credit to be given his testimony, it is not upon the basis that an intelligent witness is more truthful than an unintelligent witness but upon the theory that the witness of greater intelligence may observe more closely, remember more exactly and relate more accurately that which transpired in his presence than the witness of lesser intelligence."

That is the point here and the Illinois decisions are not given as authorities but to reveal the reasoning of the point which this petitioner is trying to bring out which is that nobody should ever be considered impeached, that is, discredited and distrusted, due to her "degree of intelligence"; and it is petitioner's po-

sition here that when a trial judge so instructs a jury he is denying to the litigant who testifies, as in this case, due process of law.

Mrs. Baxter testified concerning the accident and, wholly apart from testimony as to her own injuries, covering some thirty pages of the Transcript of the Court Reporter at San Luis Obispo (pages 1-14; 192-208; 221-223) and was aided only by witness William C. Ryan who saw nothing of the accident but testified as an expert repair man as to certain electric wiring and its effect on lights. Mr. Ryan was opposed by Albert Spierling who testified for the defense as to the electric wiring. As to the accident itself Mrs. Baxter, being alone on her side, was opposed by William D. Malmen, Edgar William McGuire, Richard V. Perdew, defendant Wilmer C. Rogers, Don N. Samuels and Ronald A. Vance; and yet Mrs. Baxter being not only a witness but within the words "including any party" was offered to the jurors as a candidate for impeachment at their discretion due to the "degree of her intelliigence".

There is perhaps no more sweeping denunciation possible of one's character than to be impeached as that term is defined under California law and doubtless by the decisions generally. That devastating debility should not be cast upon a litigant for vague, trifling and unintelligible reasons. To say as the trial judge did here to the jury that one's "degree of intelligence" is in the same category of character destruction as being convicted of a felony is a repudiation of due process of law. The idea is taken from

no sound source. It has no foundation in statutory law or judicial reasoning. It should not be permitted to prevail as the law of our land.

As a parallel situation petitioner cites the rule that a prosecuting attorney's knowingly introducing perjured testimony is a denial of due process of law. *White v. Regan,* 324 U.S. 760, 89 L. Ed. 348, 65 S. Ct. 978.

Is offering dishonest testimony any worse than telling a jury they may discard and reject honest testimony for the trivial and vague reasons here discussed?

Also, third degree and inquisition tactics applied to witnesses constitute a denial of due process of law. *Jones v. State,* 21 Ala. App. 505, 109 So. 564.

But, really, is that any more of a denial of due process of law than to be formally courteous to the witnesses but instruct the jury they may discredit and distrust a party wholly on account of her degree of intelligence or because she is proceeding with the lawsuit?

Petitioner goes no further into the question because doing so would perhaps be construed as writing a brief which she understands is to be reserved for a later time, stating here only the leading points which require judicial examination.

Certified copies of all records of the Supreme Court of California are being forwarded under separate cover, certified by the Clerk of the District Court of Appeal in San Francisco for the reason that under California practice in this proceeding all the California Supreme Court's records are in the possession of said District Court of Appeal.

Dated, Oakland, California,
September 8, 1961.

BEULAH L. BAXTER, pro se

ALFRED NELSON,
Of Counsel.

(Appendix Follows.)

Appendix A

(Vol. 191 A.C.A. 350)

In the District Court of Appeal
State of California
Second Appellate District

DIVISION THREE

2 Civil No. 24,653

Beulah L. Baxter, individually and as Executrix of the Last Will and Testament of Howard W. Baxter, Deceased,
Plaintiff and Appellant.
vs.
Wilmer C. Rogers,
Defendant and Respondent.

OPINION

In the trial court, the appellant Beulah L. Baxter unsuccessfully sought damages from respondent Wilmer C. Rogers for her personal injuries and, as executrix of the last will and testament of her deceased husband, for the latter's death. Both claims arose out of a collision between a vehicle driven by the appellant's husband, Howard W. Baxter, in which the appellant was riding, and a vehicle driven by the re-

spondent Rogers. The collision occurred on August 12, 1957, at approximately 10:30 p.m.

The respondent was driving south on a highway known as Alternate U.S. 101 outside the city limits of San Luis Obispo. The appellant and her husband were returning to their home in Piedmont from a trip to Los Angeles. They had been traveling northeast on Portuguese Flat Road. This road joins Alternate U.S. 101 at an angle. Traffic on Portuguese Flat Road is required to stop before entering Alternate U.S. 101, which is a through highway at this point. The intersection is marked for vehicles traveling northeast on Portuguese Flat Road by a stop sign at the side of the road and the word "STOP" and a stop or limit line painted on the road. Due to the angle of the intersection, the stop or limit line is approximately 55 feet beyond the stop sign at the side of the road. Vehicles traveling north on Portuguese Flat Road must stop, cross the southbound lane of Alternate U.S. 101 at an angle, and continue north on the northbound lane of Alternate U.S. 101. The collision occurred as the vehicle in which the appellant was riding was crossing the southbound lane to get into the northbound lane. It was nighttime; the intersection was not lighted. The appellant testified that her husband made a boulevard stop but, in effect, that the respondent was traveling without lights. The respondent contended that the appellant's automobile failed to make the required stop at the intersection before coming onto Alternate 101 and was driven directly into the path of the respondent's vehicle. The jury returned

verdicts for the respondent and against the appellant in her individual and representative capacities, respectively.

The appellant's sole contention is that certain instructions given to the jury were prejudicially erroneous.

Several days before the present action was commenced the respondent Rogers filed an action against Mr. Baxter's employer, McCormick and Baxter Creosoting Company, a corporation, to recover for his personal injuries and for the damage to his automobile. The two actions were consolidated for trial. At the trial, an attorney other than the attorney for the appellant in her action represented the decedent's employer. After the jury had been instructed and the two cases submitted to it, but before any verdict had been returned, a settlement was reached in the action brought by the respondent herein against McCormick and Baxter Creosoting Company. The jury was informed that that case had been withdrawn from their consideration.

The first instruction, the giving of which the appellant asserts constituted prejudicial error, was one concerning the credibility of witnesses and was requested by counsel for McCormick and Baxter Creosoting Company. It is in the language of the instruction numbered 26 (revised) of California Jury Instructions, Civil (BAJI), and is set forth in the margin.[1] It should be noted that during the cross-

[1]"In judging the credibility of witnesses, including any party who has testified, you shall have in mind the law that a witness is

examination of Mr. Rogers, for the purpose of impeaching him he was questioned at length as to numerous changes he had made in the wording of his answers in his deposition after such testimony had been transcribed.

The appellant asserts that "the paramount issue in the whole case is whether the Rogers car did or did not have lights on immediately prior to the collision," that "the only possible direct plaintiff's evidence on that point comes from Mrs. Baxter who testified that no light from the Rogers car was visible to her or to Mr. Baxter," and that the challenged instruction "corroded every word she uttered at the trial." Citing sections 1847, 2051 and 2052 of the Code of Civil Procedure,[2] counsel for the appellant argues: "By

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presumed to speak the truth. A witness, however, may be impeached and this presumption overcome by contradictory evidence; by the manner of the witness on the stand; the degree of intelligence exhibited by him; the character of his testimony; by evidence showing his motive or interest in the outcome of the case or his bias or prejudice for or against one of the parties; by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony; by evidence adversely affecting the character of the witness for truth, honesty or integrity; by proof that he has been convicted of a felony.

"You will note that I do not say that any of the matters I have mentioned do overcome the presumption that the witness is speaking the truth; I only say that they may overcome that presumption. It is for you to decide whether they do or do not."

[2]Section 1847 is: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility."

Section 2051 is: "A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts,

the common acceptation of words in the English language it is much more destructive of a person's testimony to be impeached than to have swept away the presumption of telling the truth. The code makes very definite distinctions with respect to this matter and sets up entirely different standards for impeachment or taking away the presumption for telling the truth. The quoted instruction mixes the whole together and while partially quoting each code section lets the legislature's mandate for eliminating the presumption of telling the truth be the criterion for the harsher stricture of impeaching the party."

The fallacy in the position of the appellant is that the meaning of the concept of impeachment as embodied in the challenged instruction is not as narrow as the appellant asserts. The commonly accepted understanding in the minds of laymen is that to impeach is to challenge or discredit the testimony of a witness. As said in *People v. Shannon*, 147 Cal.App.2d 300, at page 305 [305 P.2d 101]: "The word 'impeach' is in common usage—meaning to discredit. Such ordinary words do not require defining. They are presumed to be understood by the jurors." (See also 3 Wigmore on

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except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation."

Section 2052 is: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

Evidence [3d ed.], § 874; Witkin on California Evidence, § 640.)

The instruction does not purport to be aimed specifically at the appellant. It contains no incorrect statement of the law. (See *People v. Miles,* 143 Cal. 636, 640-641 [77 P. 666]; *People v. Amaya,* 134 Cal. 531, 540 [66 P. 794]; *Estate of Tompkins,* 123 Cal.App. 670, 677 [11 P.2d 886].) In view of the numerous changes which the respondent made in his deposition, as brought out in the course of his cross-examination, the instruction was just as beneficial to the appellant as it would have been to McCormick and Baxter Creosoting Company, the party on whose behalf it was requested. It is true that portions of the instruction were unnecessary under the evidence. Thus, the party offering the instruction should have omitted the words relating to the matter of conviction of a felony and the portion with respect to "evidence adversely affecting the character of the witness for truth, honesty or integrity," since no impeaching evidence of such nature appears in the record. (See *People v. Sellas,* 114 Cal.App. 367, 372-377 [300 P. 150]; *Riedy v. Bidwell,* 93 Cal.App. 202, 208 [269 P. 682]; *cf. People v. Sweeney,* *55 Cal.2d ....., ... [9 Cal.Rptr. 793, 357 P. 2d 1049].) But in the light of the record under review, there is no sound basis for the appellant's assertion that there was prejudicial error in the giving of the challenged instruction.

The remaining claim of error is based upon the giving of three instructions as to provisions of the Ve-

*Advance Report Citation: 55 A.C. 27, 38-39.

hicle Code and the effect of a violation of the right of way of a motorist. Such instructions are set forth in the footnote of this opinion.[3] The appellant, Mrs.

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[3]The references are to the Vehicle Code as it existed at the time of the accident.

The first instruction was: "The pertinent portions of Section 577 of the California Vehicle Code provide:

"The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop sign as provided in this code, except as otherwise permitted or directed in this code, shall stop:

"(a) At a limit line, if marked, otherwise before entering the crosswalk on the near side of the intersection of [or], if not, then before entering such highway or intersection.

"(b) At any point within an intersection as required by a stop sign erected as permitted by Section 471."

The second instruction was: "Section 552 of the California Vehicle Code provides:

"(a) The driver of any vehicle shall stop as required by Section 577 of this code at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard.

"Any driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway.

"(b) The driver of any vehicle shall stop as required by Section 577 in obedience to a stop sign within an intersection erected as authorized by Section 471, and after such stop shall yield the right of way to other vehicles on that part of any roadway protected by any stop sign which are so close as to constitute an immediate hazard.

"A driver having so yielded may proceed and the drivers of all other vehicles approaching on that part of the roadway protected by the stop sign shall yield the right of way to the vehicle so about to enter or cross such protected part of the roadway."

The third instruction was: "When the law says that one person has a right of way over another, its purpose simply is to establish a practical basis for necessary courtesy on the highway, and its meaning is that when at any given moment of the time, two persons, neither of whom then occupies the space in question, desire to proceed into the same place on the highway, one of them shall yield. The other has the privilege of the immediate use of the space in question. That privilege is his right of way.

"Failure to yield to one to whom the law has given the right of way is negligence."

Baxter, testified that her husband stopped his automobile at the point where the stop sign was located. But she did not see the word "STOP" which was painted on the pavement beyond that point. No further stop was made before the collision occurred as far as she knew. A police officer testified that the distance between the stop sign and the limit line painted on the roadway was 50 to 60 feet. Another officer testified that he had made notations to the effect that the word "STOP" and the limit line on the roadway were "faint" at the time of the accident; those markings had not been recently painted. The gist of the appellant's attack upon the instructions is found in the following statement of her counsel in the opening brief: "The Court's mandate that Howard Baxter's crossing the faint line is negligence affords the jury no leeway whatever and prohibits the jurors from considering whether it is excusable or justifiable and in effect directs them to disregard its faintness."

The applicable law was recently stated by this court in *Smith v. Sugich Co.,* 179 Cal.App.2d 299, at page 307 [3 Cal.Rptr. 718], as follows: " 'It is settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such a violation, and the presumption can be rebutted by evidence of justification or excuse.' (*Tossman v. Newman,* 37 Cal.2d 522, 525 [233 P.2d 1].) 'In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordi-

narily the excuse relied upon by the violator presents a question of fact for the jury's determination.' (*Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 590 [177 P.2d 279]; *Ornales v. Wigger*, 35 Cal.2d 474, 477 [218 P.2d 531].)

"If there is any evidence of excuse or justification, the jury should be instructed on the issue whether the excuse or justification for violation of a statute appears from evidence of violation plus evidence of excuse or justification or from all the surrounding circumstances. (*Fuentes v. Panella*, 120 Cal.App.2d 175, 180 [260 P.2d 853].)" (See also *Alarid v. Vanier*, 50 Cal.2d 617, 621, 624 [327 P.2d 897].)

If, in the present case, the word "STOP" and the limit line painted on the roadway were partly obliterated, so that they could not be readily seen, whether such condition arose from wear or because the markings were covered by dirt or otherwise affected, such fact could constitute an excuse for failure to stop at the limit line where the existence of such limit line was otherwise unknown to the motorist. See *Graf v. Garcia*, 117 Cal.App.2d 792, 797-798 [256 P.2d 995].) But if, as urged by the appellant, there was error in the failure to instruct on the subject of excuse or justification, it was not prejudicial because it is clear that, as will be shown, the jury determined that there was no negligence on the part of the respondent.

As has been noted, the appellant sought to recover damages for her own personal injuries and, in addition, in her representative capacity for damages for the wrongful death of Mr. Baxter. The jury was in-

structed that contributory negligence on the part of Mr. Baxter would bar recovery in the action for wrongful death. But no issue of contributory negligence was submitted to the jury in the action for damages for the personal injuries to Mrs. Baxter. It must be presumed that the jury followed the instructions of the court. (*Keena v. United Railroads,* 197 Cal. 148, 152 [239 P. 1061]; 48 Cal.Jur.2d, Trial, § 158.) Accordingly, since the jury found against Mrs. Baxter in her action relating to her own personal injuries, the conclusion must be that the jury found in favor of the respondent Rogers on the issue of whether he was guilty of any negligence which was a proximate cause of the personal injuries to Mrs. Baxter. If no negligence of his was a proximate cause of the accident, no recovery could be had against him in either action. The appellant does not contend that there was a lack of substantial evidence to support the determination of the jury in favor of the respondent on that issue. (*Cf. Haney v. Takakura,* 2 Cal.App.2d 1, 9 [37 P.2d 170, 38 P.2d 160].) She cannot predicate a right to a reversal upon an erroneous instruction relating to another issue the determination of which was not essential to the verdict reached. There has been no miscarriage of justice; no basis for a reversal of the judgment herein has been shown. (See *Alarid v. Vanier, supra,* 50 Cal.2d 617, 625.)

The judgment is affirmed.

Ford, J.

Shinn, P. J., and Vallée, J., concurred.

Filed April 18, 1961.

James E. Brown, Clerk.

Appendix B

[Title of Court and Cause.]

Filed August 29, 1959
A. E. Mallagh, County Clerk
By s/ Ruth Warnken
Deputy Clerk

Entered Aug. 28, 1959
Judgment Book 20, page 254
Judgment No. 26440

JUDGMENT ON VERDICT

Be it known that this cause came on regularly for trial, in open Court the 25th day of August, 1959, Alfred Nelson appearing as counsel for the plaintiffs, and A. H. Brazil appearing as counsel for the defendant. A jury of twelve persons was duly accepted, empaneled, and sworn to try said cause. Witnesses on the part of plaintiffs and said defendant were sworn and examined.

After hearing the evidence, the arguments of counsel, and instructions of the Court, the cause was submitted to the jury and it retired for deliberation. The jury subsequently returned into Court, and having been called, all jurors answered to their names, and thereupon rendered the following verdicts:

"We, the jury in the above entitled cause, find for defendant Wilmer C. Rogers, and against the plaintiff Beulah Baxter, individually. Dated this 28 day of August, 1959. Henry Wreden, Foreman."

"We, the jury in the above entitled cause, find in favor of the defendant, Wilmer C. Rogers, and against

the plaintiff Beulah L. Baxter, as Executrix of the Last Will and Testament of Howard W. Baxter, deceased. Dated this 28 day of August, 1959. Henry Wreden, Foreman."

Wherefore, it is ordered, adjudged and decreed that the plaintiffs shall not recover any sum whatsoever from the defendant and that said defendant shall be entitled to recover from said plaintiffs his costs herein fixed in the sum of $284.61.

Judgment entered on the 28th day of August, 1959

A. E. Mallagh, County Clerk
By Ruth Warnken
Deputy.

Office of the Clerk of the Superior Court,
State of California, County of San Luis Obispo.—ss.

I, the undersigned, Clerk of said County, do hereby certify the foregoing to be a full, true and correct copy of the Judgment entered in the above-entitled action, and of the whole thereof, and such judgment is recorded in Judgment Book 20 of said Court, at page 254.

Attest my hand and the seal of said Superior Court, this 28th day of August, 1959.

A. E. Mallagh, Clerk
(Seal) By /s/ Ruth Warnken
Deputy Clerk

Appendix C

Order Due
June 16, 1961

In the Supreme Court of the State of California

In Bank

Baxter, individually and as Executrix, etc.,

vs.

Rogers

Order Denying Hearing
After Judgment by District Court of Appeal
2nd District, Division 3, Civ. No. 24653

Appellant's petition for hearing DENIED.

GIBSON
Chief Justice.

FILED
June 14, 1961
William I. Sullivan, Clerk
By R. J. Bell
S. F. Deputy

SUPREME COURT, U. S.

FILED

OCT 5 1961

JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 397.

BEULAH L. BAXTER, individually and as Executrix of the Last Will and Testament of Howard W. Baxter, Deceased,

Petitioner,

vs.

WILMER C. ROGERS,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT

TABLE OF AUTHORITIES CITED

CASES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 397.

BEULAH L. BAXTER, individually and as Executrix of the Last Will and Testament of Howard W. Baxter, Deceased,

Petitioner,

vs.

WILMER C. ROGERS,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition for a writ of certiorari to the California District Court of Appeal is grounded solely upon a claimed error in the giving of an instruction to the jury expressing California law applicable to all litigants regarding the general tests for judging the credibility of witnesses. Petitioner here claims that the instruction in some manner or other has deprived her of Due Process of Law under the United States Constitution.

1. *Untimeliness of Petitioner's Claim:* It is the California rule that a constitutional question must be raised at the earliest opportunity or it will be con-

sidered as waived. (*Hershey v. Reclamation Dist. No. 108,* 200 Cal. 550, 564, 254 Pac. 542, 547.) It also is the California rule that a matter not raised in the original appeal briefs but raised for the first time by way of petition for rehearing will not be considered. (*Prince v. Hill,* 170 Cal. 193, 195, 149 Pac. 578, 585; *Smith v. Crocker First Nat. Bank,* 152 Cal. App. 2d 832, 836-837, 314 P. 2d 237, 241.) A constitutional claim may be forfeited by failure to make timely assertion before a tribunal having jurisdiction to determine it and, "while this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts." (*Yakus v. United States,* 321 U. S. 414, 444-445. See also: Concurring opinion of Mr. Justice Brandeis in *Whitney v. California,* 274 U. S. 380; *Stembridge v. Georgia,* 343 U. S. 541.) The California statutory exception to given instructions (Pet. pp. 12-13) obviously did not constitute a raising by petitioner of any claim in the trial court of an unconstitutional deprivation of due process of law. She does not claim to have raised it in the trial court by motion for a new trial. Yet her "first opportunity" would have been in the trial court proceedings. She does not claim to have raised it in her original briefs before the California District Court of Appeal. No mention of any claim of deprivation of Due Process of Law was made therein. Her petition for certiorari states (p. 13) that she mentioned the matter in her

Petition for Rehearing to that court. That is the first time her claim is shown to have been presented. The District Court of Appeal properly denied her Petition without opinion. Likewise properly denied without opinion was her Petition for Hearing by the California Supreme Court. Petitioner's claim appears to have been untimely and properly was not considered by the California Courts.

2. *Lack of Substantial Federal Question:* There here appears to be no substantial Federal question presented by the Petition. The given instruction constitutes an obviously correct and proper statement of law for determining the credibility of witnesses and leaves the matter solely to determination by the jury. For example, certainly credibility of a witness should be determined by consideration of factors such as his interest, motive, bias, prejudice, and like matter. While petitioner tries to leave an impression that the instruction specifically or specially concerned her, it in truth was general in its application. As stated by the District Court of Appeal in its opinion (Pet. App. p. vi): "The instruction does not purport to be aimed specifically at the appellant. It contains no incorrect statement of the law. (Citations.)" Even an incorrect charge to a jury in a criminal case in a state court has been held not to deprive the prisoner "of the equal protection of the laws or of due process or abridge his immunities, within the Fourteenth Amendment of the United States Constitution." (*Davis v. Texas*, 139 U. S. 651; 12 Am. Jur. p. 253, sec. 500.) Here, no error was committed

in the instruction and certainly petitioner thereby was not deprived of any Due Process of Law.

Wherefore, it respectfully is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HENRY F. WALKER, and
A. H. BRAZIL,
Counsel for Respondent.